United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2156

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P/S

In The

United States Court of Appeals

For The Second Circuit

FRED LOWENSCHUSS, Trustee for Fred Lowenschuss Associates Pension Plan, individually and on behalf of all other persons and shareholders of Great Atlantic & Pacific Tea Co, Inc. who are similarly situated,

Plaintiff-Appellant,

- against -

W.J. KANE, H.J. BERRY, R.M. BROWN, JR., W. CORBUS, D.K. DAVID, H.C. GILLESPIE, J.S. KROH, E.A. LE PAGE, R.F. LONGACRE, M.D. POTTS, J.M. SCHIFF, P.A. SMITH, H. TAYLOR, JR., E.J. TONER, W.I. WALSH, N.F. WHITTAKER, J.A. ZEIGLER (all of whom are officers and directors of Great Atlantic & Pacific Tea Co., Inc.), and GREAT ATLANTIC & PACIFIC TEA CO., INC., and C.G. BLUHDORN and GULF & WESTERN INDUSTRIES, INC., and KIDDER PEABODY & CO.,

Defendants-Appellees,

RACHEL C. CARPENTER,

Appellant.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

PRELIMINARY STATEMENT

Plaintiff is compelled to respond to the briefs filed on behalf of defendants-appellees to refute certain false, strained and misleading assertions and arguments contained therein. Particular attention will be directed to the brief of defendants Gulf & Western Industries, Inc. ("G & W") and its Chairman of the Board and Chief Executive Officer, Charles G. Bluhdorn (Bluhdorn).*

Although the attorneys for G & W and Bluhdorn have researched and written previous briefs in this case before the lower Court and have found it necessary to ask this Court for two extensions of time in order to prepare their brief in this appeal, they have nevertheless evaded the basic issues of this case. Lacking any valid defense, these defendants have instead sought to impugn the plaintiff's motives, distort the facts, and thoroughly confuse the legal issues - apparently hoping by these tactics, to obscure their blatant culpability and to have the members of the plaintiff class suffer the consequences of defendant's own wrongdoing.

Moreover, the defendants now urge upon this Court a concocted "federal policy" that not only would strip a tendering shareholder of his rights under state contract law, but would also require this Court to turn its back on the full disclo-

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* Hereinafter cited as "G & W Br."

sure policy of the Williams Act. Securities Exchange Act of 1934, Sections 14(d) and (e), 15 U.S.C. Section 78n (d), (e).

Although the G & W brief is cleverly couched in terms that change like chameleons from sentence to sentence, the true import of G & W's underlying position is unmistakeable and shocking: G & W is asking this Court to declare a rule of law (which G & W and other companies could use in the future) giving a "raiding company" the license to embark on what it knows to be an illegal tender offer for the secret purpose of gaining control of a "target company" without disclosing either its own true intent, or the potential risks to tendering shareholders. Under the position being urged by defendants, in the event that consummation of a tender offer is preliminarily enjoined, and the raiding company subsequently determines in its sole discretion that it no longer is in its best interests to pursue the tender offer further, it (the raiding company) will be able to walk away from any responsibility to the tendering shareholders, and this would be true despite the fact that it consciously drafted the tender offer in absolute unconditional terms, without disclosing any of these secret reservations, so as to lull the tendering shareholders into a false sense of security.

G & W and Bluhdorn also have urged upon this Court another rule, which would have an equally insidious effect in under-

mining the Williams Act: That whenever litigation is instituted during the course of a tender offer, the tendering shareholders would no longer be entitled to rely on the truthfulness of the statements contained in the tender offer, but must make their decision of whether or not to tender at their own peril, as if the protections afforded by the Williams Act no longer existed! Such a rule would render the Williams Act inoperative as to tendering shareholders in a large percentage of cases, insofar as "litigation alleging fraud 'by one side or the other' (is) 'almost standard operating procedure' in contested tender offers." See G & W Br. 21 citing H. R. Rep. No. 1711, 90th Cong., 2d Sess. 4 (1968).

Ironically, G & W argues that such an erosion of the full-disclosure policies of the Williams Act is necessary so as not to disturb "a carefully balanced system of disclosure and regulation" or to add "undue burdens" to the making of tender offers. G & W Br. 21. This argument is apparently based on defendant's fear that G & W might suffer some tactical disadvantage on the inter-corporate battlefield if it were required to be truthful with tendering shareholders. However, such truthfulness is exactly what the Williams Act demands. The provisions of Section 14(e) were not meant merely to serve as strategies for corporate giants, but to protect the interests of the investing public.

For these reasons, as well as others discussed in this Reply Brief and Plaintiff's original Brief, the arguments of the defendants are directly contrary to established contract law and federal policy, and should be soundly repudiated.

POINT I

DEFENDANTS ARE ATTEMPTING TO SHIFT ONTO THE TENDERING SHAREHOLDERS THE VERY RISKS THAT G & W UNDERTOOK AND INTENTIONALLY CONCEALED.

Defendants G & W and Bluhdorn have gone to inordinate lengths to vilify the plaintiff as a mere "risk-arbitrageur" who is making "overreaching claims" in hopes of reaping a "windfall profit". On the other hand, these defendants are attempting to characterize themselves as altruistic benefactors, completely free from fault, who simply sought to bestow upon plaintiff the "benefits" of the tender offer.

In actuality, the facts that were developed in the G & W v. A & P litigation clearly demonstrate that G & W and Mr. Bluhdorn were the ones guilty of "overreaching", and had every reason to know that their tender offer would be violating the boundaries of the antitrust laws. They also knew that A & P management would be hostile to the tender offer and that there was a substantial likelihood of litigation and a preliminary injunction. Yet, they not only failed to disclose any of these risks to the tendering shareholders, but they also actively misrepresented the purposes of the

tender offer, falsely stating that it was merely for investment purposes.

Defendants' incursion into A & P apparently began on February 7, 1972, when Bluhdorn sent an emissary to arrange a private meeting with William J. Kane, Chairman of the Board and Chief Executive Officer of A & P, in an effort to obtain A & P management's cooperation. After Chairman Kane refused to meet with Mr. Bluhdorn, G & W went into the open market and began purchasing shares of A & P stock in "street name" in order to maintain the secrecy of G & W's purchase. The brokerage firm of Kidder Peabody & Co. was used by G & W and Bluhdorn to accomplish the acquisition of A & P shares.

Not being able to obtain sufficient numbers of shares of A & P stock on the open market, Bluhdorn attempted to purchase shares from the Hartford Foundation (A & P's largest shareholder, owning 33.6% of the outstanding shares) beginning in November 1972. After the representatives of the Hartford Foundation refused to sell any of its holdings to G & W, the defendants decided to launch the public tender offer that is the subject of this litigation.

In making the tender offer, G & W and Bluhdorn were in a better position than anyone to know the risks of their undertaking. They knew the full range of their own corporate holdings and business interests. Considering the fact that G & W

was committing 78 Million Dollars to purchase the tendered A & P shares (17a-2) - the largest single commitment in G & W's history (476 F.2d at 696) - it is reasonable to assume that G & W also fully investigated the holdings and business interests of A & P, the target company, as well as the effects on the market that could be expected if G & W were successful in its tender offer. Defendants also had the legal advices of two large law firms that had substantial prior experience in securities matters and in particular in G & W's and Bluhdorn's dealings as well as in the field of corporate tender offers. Moreover, they knew that A & P management would be hostile to the tender offer and likely to take steps to oppose it. G & W's strategy against A & P was to launch a blitzkrieg style attack, in which it sought to stampede A & P shareholders into tendering their shares within the minimum period of time permitted by section 14(d) (6) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78n (d) (6). There can be no doubt that G & W was taking a calculated risk, in the hope that it could successfully consummate the tender offer and present A & P management with a fait accompli, before A & P had sufficient time to mobilize its defenses.

As viewed by G & W and Bluhdorn, the potential tendering shareholders represented G & W's last chance to obtain the desired number of A & P shares, all other efforts having failed.

Therefore, G & W chose to draft its tender offer in terms that were as attractive as possible, without disclosing either the substantial antitrust problems that existed or G & W's intention of simply backing out of the tender offer in case a preliminary injunction resulted.

Naturally, this meant that G & W had to set the tender price somewhat higher than the market price. This was no act of generosity on G & W's part, but merely the realistic price G & W would have had to pay to accomplish its objectives. If G & W had simply continued trying to purchase the 3.75 million shares on the open market, in individual transactions, the market price of A & P stock would probably have been driven far higher than the $20.00 per share tender offer price. Therefore, the price offered by G & W was not simply a "premium"or "windfall" to the tendering shareholders; it was a bargain price from G & W's stand point, considering the realities of the marketplace.

Rather than giving the tendering shareholders the opportunity to make an informed choice regarding the risks involved in the tender offer, G & W framed the tender offer in what clearly appeared to be irrevocable, absolute, and unconditional terms - without any indication that G & W was reserving the option to escape completely from any obligation in the event of a preliminary injunction. Consequently, the tender-

ing shareholders had every reason to expect that G & W would either take the necessary steps to dissolve the injunction so as to make performance possible, or else respond in damages to make the tendering shareholders whole.

Furthermore, G & W made it impossible for the tendering shareholders to intelligently evaluate the possibility of anti-trust violations. This Court has previously recognized the probability that G & W violated Section 14(e) by misrepresenting and omitting to state material facts concerning the anti-trust problems raised by the tender offer. G & W v. A & P, 476 F. 2d at 695-697.

Among other things, this Court found considerable evidence that G & W lied to the tendering shareholders (as well as to the Securities and Exchange Commission) about the purpose of the tender offer - falsely stating that the shares were being acquired merely as an "investment," when the true purpose was to exercise influence and control over A & P management. 476 F. 2d at 695.

Such an intention is of crucial importance in determining whether an acquisition of stock is in violation of Section 7 of the Clayton Act, particularly with regard to the proviso in paragraph 3 which exempts acquisitions that are "solely for investment and not...to bring about... a substantial lessening of competition." 15 U.S.C. Section 18, paragraph 13.

This Court also found that G & W also withheld numerous other material facts that would have indicated substantial antitrust obstacles to G & W's purchasing a large portion of A & P shares. These findings are quoted at pages 41-42 of plaintiff's brief and need not be repeated here.

The single instance in which G & W indicated any concern about antitrust problems was in regard to Bluhdorn's interest in the Bohack supermarket chain, a competitor of A & P. See 17A-3. G & W attempted to gloss over this problem by assuring tendering shareholders that Bluhdorn had resigned as a director of Bohack and had placed his shares in a "voting trust". Tendering shareholders had no way of knowing that Bluhdorn's "voting trust" (which went through a number of revisions dated the same day) was really a "sham", see G & W v. A & P, 356 F. Supp. 1066, 1072-1073 (SDNY 1973).

It is noteworthy that the original version of the voting trust provided that Bluhdorn's shares would be disposed of if" (i) G & W becomes the controlling shareholder of A & P", defined as either being the "largest single holder of common stock of A & P" or having "a majority of the members of the Board of Directors...designees of G & W." (Emphasis added by this Court in its previous opinion, see G & W v. A & P, 476 F.2d 687, 691 f.n.4 (2nd Cir. 1973)).

These provisions (which were not disclosed to the tendering shareholders) supply further evidence of G & W's and Bluhdorn's underlying intention of taking control of A & P.

G & W not only made it impossible for tendering shareholders to intelligently evaluate the legal risks concerning the tender offer, because of the aforesaid misrepresentations and omissions, but it also vigorously sought to suppress the true facts after the tender offer was announced. After A & P management announced its opposition to the tender offer on February 2, 1973, and suggested that "it would seem that the acquisition of a large block of A & P shares by Gulf & Western raises most serious questions under the antitrust laws" (476 F.2d at 1070), G & W quickly filed suit against A & P, alleging that A & P had made false and misleading statements in its opposition to the tender offer, and seeking to enjoin A & P from making further statements.

Ironically, G & W is now attempting to turn the facts completely around, arguing that the tendering shareholders voluntarily assumed all risk concerning the tender offer, by reason of A & P's announcement and the mere existence of the inter-corporate litigation. In order to support such an outlandish argument, G & W has had to take considerable liberty with both the facts and the law, as well as with logic.

First, G & W has erroneously stated that A & P announced on February 2, 1973, that it would "sue" to block the tender offer on antitrust grounds. G & W Br. 2. On the contrary, neither A & P's initial announcement nor its follow-up letter to A & P shareholders contained any mention of either "filing suit" or obtaining of an injunction.

Second, it should be noted that the inter-corporate litigation was initiated by G & W - not A & P - thereby creating the impression that G & W had evidence to prove that A & P's suggestion of "serious questions under the antitrust laws" was unfounded.

Third, and most significant, the mere existence of inter-corporate litigation did not supply the tendering shareholders with any substantive facts upon which to base their decision of whether or not to tender their shares. Any knowledge they had of the litigation consisted merely of charges by G & W and counter-charges by A & P's management.

Regardless of the litigation, the tendering shareholders were legally entitled to rely upon the representations contained in G & W's tender offer, which were subject to the statutory requirement of truthfulness under Section 14(3) of the Securities Exchange Act of 1934. Furthermore, this is exactly what G & W intended the tendering shareholders to do when it brought its injunctive action against A & P for mak-

ing statements in opposition to the legality of the tender offer. Based on these representations, it was reasonable for the tendering shareholders to conclude that the tender offer could be lawfully consummated, and that there was no likelihood of illegality or frustration of performance.

It is incredible that G & W and Bluhdorn should now attempt to shift the burden of risk upon the tendering shareholders who reasonably relied upon the veracity, candor, and expertise of the defendants. This is particularly outrageous in view of G & W's attempts to suppress A & P's exposure of the illegalities being perpetrated by the defendants.

The defendants have suggested that plaintiff is not entitled to any protection under the law, on the grounds that he was a "risk arbitrageur" who attempted to profit on the price "spread" between the market price and the tender offer price, and that he was "making odds" on the potential illegality of the tender offer, G & W Br. 4. The fallacy in this argument is that it was G & W itself that initially created the price spread, partly to encourage arbitrageurs to tender A & P shares. It is well known that arbitrageurs are routinely relied upon to supply a large percentage of the shares received in tender offers, and that the success of many tender offers depend on their participation.*

* "It has been stated that,...over 50% of all tenders come through arbitraguers." Henry, Activities of Arbitraguers in Tender Offers, 119 U. Pa. L. Rev. 466 (1971). See also O'Boyle, Changing Tactics in Tender Offers, 25 Bus. Law 863, 866 (1970)

Furthermore, there is no justification for denying an arbitrageur the same rights and remedies as other investors. The mere fact that an arbitrageur voluntarily incurs certain known risks with regard to a tender offer (such as the possibility in the present case, that G & W might only accept a pro-rata portion of the shares tendered) does not mean that he also embraces undisclosed risks of fraud or intentional concealment of facts by the offeror. Nor does it mean that he should not be entitled to rely on the offeror's representations in evaluating the extent of the risks undertaken.

Otherwise, there would be no rational basis upon which an arbitrageur could decide whether, and at what price, to purchase and tender shares in response to a tender offer, and the important function served by arbitrageurs would be seriously impeded.

The facts demonstrate that G & W and Bluhdorn were the ones gambling on the potential illegality of the tender offer. They stood to profit from their adventure as much, if not far more, than the tendering shareholders. They made the tender offer with full knowledge of facts which they concealed from the public. Consequently, it is they who should be held to have assumed the risk of non-consummation - not the plaintiff and tendering shareholders.

POINT II

DEFENDANTS G & W AND BLUHDORN NOT ONLY KNEW OF THE FACTS GIVING RISE TO THE ILLEGALITY OF THE TENDER OFFER, BUT ALSO COMPOUNDED THE ILLEGALITY BY THEIR WRONGFUL CONDUCT AND INTENTIONS

Defendants G & W and Bluhdorn apparently have given up any hope of denying that the tender offer was defective under the Williams Act. Instead, they have spun a devious, semantical argument which pretends that G & W's misrepresentations simply have no effect on this case, and which emasculates the concept of "fault" to a point beyond recognition.

For example, G & W asserts that, for the purpose of this action, G & W's Williams Act violations are irrelevant, because the alleged Clayton Act violations would have still provided a basis for the preliminary injunction. G & W Br. 19. However, this argument disregards the fact that G & W's misrepresentations and omissions made it impossible for the tendering shareholders to evaluate any potential antitrust problems when they tendered their shares. This Court previously has held that G & W's failure to disclose the possible antitrust violations was a violation of the Williams Act, see 476 F.2d at 697 (quoted in plaintiff's Brief, p. 41-42.)

G & W next contends that the alleged violations of Section 7 of the Clayton Act would have existed independently of G & W's and Bluhdorn's intent to take control of A & P, and that therefore the alleged illegality was not based on any "blameworthy"

conduct of the defendants, but merely on a "juxtaposition of facts, trading patterns, market shares and economic assumptions." G & W Br. 36.

This argument is fallacious for at least two reasons: First, it forgets that G & W's and Bluhdorn's conduct and intentions were important factors in the finding of probable Clayton Act violations. It should be remembered that G & W and Bluhdorn themselves, at page 2 of their reply brief in the G & W v. A & P litigation, admitted to this Court that the main issue was "the intent and ability of G & W to control A & P in the immediate future" (Emphasis in the original). This Court determined this issue by finding a substantial likelihood that G & W would seek to obtain control of A & P and that it had the potential to attain that goal, see 476 F.2d at 694.

This Court found evidence that G & W not only intended to take control of A & P, but that "G & W also owns or controls several companies which are actual or potential suppliers of A & P, and apparently has plans to expand such operations so as to take advantage of its shareholder position in A & P." 476 F.2d at 697 (Emphasis added)

Second, it must be assumed that G & W, Bluhdorn, and their advisors carefully studied the market factors before making the "largest single committment in G & W's history,"

and they had full knowledge of the economic factors that would give rise to illegality under the Clayton Act. Nevertheless, they voluntarily and intentionally embarked on their tender offer in the face of these facts, apparently gambling that they would not be exposed.

Under these circumstances, it is fatuous for defendants to argue that the preliminary injunction was not G & W's "fault", but rather A & P's; or that "(t)he only 'fault' lay in G & W's making the very offer which appellants seek to embrace," G & W Br. 36. The fact remains that G & W placed before the public a tender offer which G & W knew or at least had reason to know was illegal, while intentionally misleading the public to believe that it was legal. The question of who secured the preliminary injunction can in no way detract from the defendants' responsibility to the tendering shareholders, as is clearly set forth in plaintiff's Brief, pp. 66-67.

POINT III

DEFENDANTS HAVE NOT PROVEN IMPOSSIBILITY OF PERFORMANCE, BUT ARE MERELY ATTEMPTING TO ASSERT HIDDEN RESERVATIONS THAT ARE CONTRARY TO THE EXPRESS TERMS OF THE CONTRACT OFFER

As discussed at length in plaintiff's Brief, pp. 66-84, G&W's contractual obligations to the tendering shareholders are not excused by the doctrines of either "illegality of contract" or "impossibility of performance," under applicable New York law. Therefore, G&W has attempted to scramble certain aspects of these doctrines together, adding a dash of dicta drawn out of context from a few federal cases, in the hope of concocting a totally new doctrine that would render it competely immune from any of its obligations to the tendering shareholders both under contract law and under the Williams Act.

G&W asserts, on the one hand, that there never was any final determination that the tender offer was "illegal", and on the other hand, that the mere existence of a preliminary injunction rendered the tender offer impossible of performance and automatically excused G&W of any obligation, as a matter of law.

Since applicable New York contract law obviously does not support this conclusion, G&W has tried to confuse the issue by intimating that the "federal common law" of impossibility might lead to a different result, citing the federal cases of the Texas Company v. Hogarth Shipping Company, 256 U.S. 619 (1921); Paramount Famous Lasky Corporation v. National Theatre Corp., 49 F.2d 64 (4th Cir. 1931); and Kansas Union Life Insurance Company v. Burman, 141 F.835 (8th Cir. 1905). However, the governmental restraints

imposed in those cases did not arise from the contracting parties' alleged violation of pre-existing law, as exists here. Furthermore, G&W has failed to point out that these cases were decided prior to the doctrine of Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), which requires that federal courts apply the common law of the state in which the transaction took place. This rule was correctly recognized by the Court below, 99 a footnote 5.*

A. This Court's Affirmance of the Preliminary Injunction Could Not Have Nullified the Contractual Rights of Tendering Shareholders

Defendants' specious defenses consist of constantly shifting from one contradictory theory to another, without following any of them through to their logical conclusions. For example, G&W argues that this Court's affirmance of the preliminary injunction rendered the tender offer contracts null and void, and automatically destroyed any and all rights thereunder. Yet G&W insists that there was no final adjudication of illegality and admits that it subsequently extended the tender offer two additional times to allow time "to consider the problems in litigation." G&W Br. 44 (Emphasis added).**

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* "This Court finds that the New York law must be applied in determining whether the doctrine of impossibility applies here. Even though jurisdiction of this suit is supposedly derived from the securities acts, I find it appropriate to look to New York law regarding questions of contract law since the offer and acceptance and at least part of the performance involved in this contract was to take place in New York..." (Footnote 5 of the lower Court's Opinion).

**If the tender offer was actually dead, as defendants contend, then the extension of the tender offer by the defendants is an admission of defendants' further violation of the Williams Act and bad faith toward the tendering shareholders.

In other words, G&W clearly recognized that the preliminary injunction did not nullify the tender offer or void the contracts thereunder. The decision to abandon the tender offer was made at G&W's own discretion.

G&W has admitted that this decision was made after the intercorporate litigation had been remanded to the district court and A&P commenced its discovery proceedings. Upon receiving seven pages of requests for documents and twenty-five pages of interrogatories from A&P, G&W says that it recognized the "enormous scope of the litigation posed by the antitrust issues" and decided that it did not wish to bear "the burden that had been imposed by the G&W - A&P entanglement".

It is also apparent that G&W and Bluhdorn knew the underlying illegality of their conduct and did not want either to expose themselves to a final adjudication of such illegality, or to take appropriate steps to correct it. They have confessed that establishing the legality of their tender offer would have been "difficult to say the least, and remote at best". G&W Br. 44, footnote.

For these reasons, G&W voluntarily chose to reach an accommodation with A&P, whereby discovery was stayed (during which time defendants prevailed upon the district court to dismiss the instant case),* the tender offer was terminated, and a settlement was

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* It is not unreasonable to assume that one of the implied conditions to the settlement of the litigation between G&W and A&P was the dismissal of the instant action by the district court. It should be noted that G&W's termination of the tender offer coincided with the dismissal of this action by the district court.

approved by the district court, without allowing any representation of the interest of tendering shareholders.

Despite defendants' misguided assertions, this court's decision in G&W and A&P did not hold that the tender offer was automatically destroyed by the preliminary injunction. On the contrary, this Court specifically pointed out, "We think that it is important... to bear in mind that...the preliminary relief granted is not nearly as final as G&W urges." 476 F.2d at 698 (Emphasis added).

Nevertheless, defendants have attempted to draw such an inference by their strange interpretation of this Court's statement that "If after trial on the merits, G&W is vindicated, it will not be foreclosed from renewing its tender offer." 476 F.2d at 698.

Defendants argue that the word "renewing" indicates that this Court assumed that the tender offer was automatically dead. However, viewed in the context supplied by this Court in the footnote to the quoted language, it is clear that this Court specifically rejected G&W's argument that the tender offer was destroyed:

> "G&W argues that after April 3, the tendering shareholders have the right to withdraw their tendered shares, thereby effectively destroying the tender offer. Suffice it to note that the provisions of the Williams Act referred to, 15 U.S.C. Section 78n(d)(5) (1970) merely gives shareholders the option of withdrawing; it says nothing about resolicitation of those shares; and indeed it authorizes adding to the attractiveness of the tender offer. 15 U.S.C. Section 78n(d)(7)." 476 F.2d 698, n. 19 (Emphasis original).

Therefore, when viewed in their proper context, this Court's remarks about "renewing" the tender offer merely pointed out that G&W would have an opportunity to resolicit shares in the event

that any of the tendering shareholders exercised their option to withdraw them after April 3, 1973. As to tendering shareholders who did not exercise this option, the contracts under the tender offer would remain intact.

With a breathtaking indifference to law and logic, the defendants next take the position that this Court's affirmance of the preliminary injunction - which they admit was not a final adjudication as to G&W or A&P - nevertheless acted as a final adjudication of the rights of tendering shareholders, who were not even parties to the litigation!

The blatant fallacy in this position (not to mention the manifest denial of due process) is so shocking that defendants have tried to obscure the fundamental contradictions in a shroud of rhetorical fog - even to the extent of misapplying the words of this Court to serve that purpose.

In particular, the defendants rely on this Court's statement that:

> "A&P shareholders...have no inherent right to proceed with an unlawful tender; a requirement of lawfulness is included by implication in every tender offer." 476 F.2d at 698.

Defendants argue that, merely because this Court undertook a "balancing of all the interests" in deciding whether to affirm the preliminary injunction and decided that the interests of tendering shareholders did not warrant the granting of specific performance at that stage of the litigation, this meant that the tendering shareholders should be completely deprived of all opportunity to have their contractual rights litigated on the merits.

When this Court remanded the G&W v. A&P litigation to the lower court, "with a view to the earliest possible date for trial on the merits consistent with the rights of the parties" (476 F.2d at 799), the defendants contend that this indicated that the only "parties" (emphasis added by defendants, G&W Br. 40)who were entitled to their day in Court were G&W and A&P, and that the tendering shareholders whose interests this Court specifically recognized, no longer were entitled to consideration. It is inconceivable that this Court could have intended such a result!

In actuality, the tendering shareholders' right to recover damages was never before this Court, and this Court had no occasion to rule on the merits of any of their claims under either the Williams Act or state contract law. The same was true in the case of Elco Corp. v. Microdot, Inc., 360 F.Supp. 741, 755 (D.Del. 1973), cited by defendants.

In that decision (which was never appealed), the district judge in Delaware merely observed, by way of obiter dictum, that the tendering shareholders "may indeed suffer some remedial loss" if a preliminary injunction was granted. 360 F.Supp. at 755.

Furthermore, if defendants had bothered to check the record in that case, they would have seen that the Microdot tender offer contained a "litigation out" clause, which expressly gave Microdot the option of withdrawing the tender offer under the circumstances. The Microdot tender offer specifically stated:

> "6. Withdrawal of Offer. Microdot may withdraw this offer, at its option, at any time...(b) if any material or substantial legal action or administrative proceeding is instituted or threatened against Microdot or Elco."

Tender Offer of Microdot Investing, Inc., dated Mar. 6, 1973; Philadelphia Inquirer, March 7, 1973, p.7-D (emphasis added).

This is precisely the type of provision which G&W purposely omitted from its tender offer, and which G&W now seeks to insert by implication on the basis of Microdot-conveniently ignoring that in Microdot the "litigation out" clause had been expressly spelled out.

In any event, the district judge in Microdot had no authority to determine the tendering shareholders' right to damages, since they were not parties to the case, and therefore, his off-hand remark should not influence this Court to abrogate fundamental due process of law.

This court's concern for due process was recently expressed in Pepsico, Inc. v. F.T.C., 472 F.2d 179 (2nd Cir. 1972). This is the very same case that defendants have attempted to twist around for the purpose of denying due process, by quoting the Court out of context and omitting the crux of the Court's decision.

In the Pepsico case (an action in which the F.T.C. sought to restrain Pepsico's enforcement of contracts with its bottlers pertaining to exclusive territories), Pepsico argued that unless the F.T.C. joined all of the bottlers in the action, Pepsico's compliance with the restraining order might render it liable to the bottlers for breach of contract, if Pepsico allowed competitors to invade their "territories".

Although this Court rejected the contention that Pepsico would be liable to the bottlers under those circumstances, it limited this result to cases where the third parties to the

contracts had the opportunity to intervene in the injunction proceedings. Thus, the quotation which appears on page 32 of G&W's Brief is immediately followed by these words (which were conveniently omitted by defendants):

> "This is particularly so in a context where the persons who would seek to enforce liability know of the proceeding and have had an opportunity to intervene before the agency 'in order to safeguard their interest'". 472 F.2d at 188 (Emphasis added).

In support of this requirement of due process for the third parties to the contracts, this Court cited the United States Supreme Court decisions of Consolidated Edison Company v. N.L.R.B., 305 U.S. 197 (1938); and National Licorice Co. v. N.L.R.B., 309 U.S. 350 (1940); and concluded:

> "Reading National Licorice and Consolidated Edison together, we think the Court is clearly of the view that, in an agency proceeding seeking to vindicate public rights against a respondent, the private rights of other parties can be concluded if they had notice and an opportunity to intervene."472 F.2d at 188, n.10.

In the present case, the plaintiff had asked for leave to intervene in the G&W and A&P litigation immediately after the case had been remanded to the district court for trial on the merits. This was denied by the court below. Furthermore, plaintiff cannot be faulted for not attempting to intervene before the lower court prior to the preliminary injunction (in other words, during the 8-day period of February 5th to February 13th), since plaintiff had neither sufficient time nor knowledge of the facts at that stage of the proceedings.

On March 19, 1973, plaintiff forwarded to Judge Duffy a motion to intervene in the inter-corporate litigation, which

motion was filed of record on April 2, 1973, and also requested the opportunity "to assist in formulating some method by which this matter may be disposed of without a lengthy trial."126(a). Plaintiff, in his letter of April 23, 1973, explained to Judge Duffy that plaintiff sought to enlist

> "the aid of this Court and the parties of this action...to fashion a lawful tender offer....
>
> "In seeking intervention, our aim is to conserve judicial resources and assist in providing a means of solving the problems presented without the necessity of protracted litigation....
>
> "It is suggested that a hearing be held wherein each of the parties clearly articulate its respective position on the record, thereby crystallizing the real issues presented. At that time, the determination can be made whether or not this matter can be resolved in an amicable fashion or if it will be necessary for extensive litigation." 128 a.

Both G&W and A&P vigorously opposed plaintiff's motion to intervene, and Judge Duffy failed to take any action on plaintiff's motion for several months. During this period, plaintiff was kept almost totally in the dark as to the proceedings in the G&W v. A&P litigation. Plaintiff specifically requested through Judge Duffy that the parties be directed to supply him all papers filed in the proceedings pending disposition of his motion to intervene. 130a. But all the plaintiff received was a single letter from G&W's attorney, which simply mentioned a discovery motion that had already been argued. 131a. Plaintiff further requested that G&W's attorney supply copies of all papers filed with the Court (132a), but he never received any reply.

During this time, G&W and A&P voluntarily entered into a behind-the-scenes settlement between themselves, without any notice to the plaintiff and in total disregard of the rights of tendering shareholders. Finally, on September 26, 1973, Judge Duffy (1) approved the settlement between G&W and A&P and (2) denied plaintiff's Motion to Intervene as being "moot", with the result that plaintiff was never allowed the opportunity to intervene or to participate in that action on the merits. This Court subsequently dismissed plaintiff's appeals from these orders, presumably on the grounds that plaintiff had an adequate remedy in the present action.

For these reasons, the tendering shareholders' rights cannot have been barred by the preliminary injunction in the G&W v. A&P, because they were never permitted to intervene, participate in settlement, or to have their rights litigated on the merits. Therefore, the result urged by defendants would be in direct contravention of due process of law, as well as contrary to the rules enunciated by this Court in Pepsico, Inc. v. F.T.C. and by the Supreme Court in Consolidated Edison Co. v. N.L.R.B. and National Licorice Co. v. N.L.R.B., cited supra.

In summary, neither the legality of the tender offer nor the contractual rights of the tendering shareholders have ever been determined on the merits. This Court's affirmance of the preliminary injunction did not render the tender offer contracts legally void as to G&W, but merely delayed performance pending a trial on the merits. Therefore, the decision could not have had any greater legal effect with regard to the tendering shareholders.

The recognition of the legal rights and remedies of tendering shareholders would not create any "new inhibitions" (G&W Br. 28) or add "undue burdens" (G&W Br. 21) to discourage legitimate tender offers, as complained of by defendants. On the contrary, the common law of contracts existed long before the Williams Act, and was not abrogated by federal legislation. Section 28(a) of the Securities Exchange Act of 1934 specifically provides that the "rights and remedies" of the Act "shall be in addition to any and all other rights and remedies that may exist in law or equity..." 15 U.S.C. Section 78bb(a).

Defendant's citations concerning the "balance of regulation" under the Williams Act have nothing to do with limiting the rights of tendering shareholders. The congressional report quoted by defendants (G&W Br. 21) specifically indicates that the only interests subject to such balancing were those of "management" as opposed to those of "the person making the tender offer." S. Rep. No. 550, 90th Cong. 1st Sess. 3 (1967).

This Court did not hold otherwise in Abrams v. Occidental Petroleum Corp., 450 F.2d 157 (2nd Cir. 1971), aff'd sub nom, Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582 (1973), cited by defendants at G&W Br. 28. In Abrams, this Court merely refused to grant further protection to "target" companies, in addition to that intended by Congress under the Williams Act. 450 F.2d at 164, n.15.

Therefore, the granting of relief to tendering shareholders would not upset the purposes of the Williams Act, but would be in perfect accord with its underlying purpose: the "protection of investors." See H.K. Porter Co. v. Nicholson File Co., 482 F.2d

421, 424 (1st Cir. 1973). Such relief would also have a therapeutic effect by encouraging corporations to assume greater responsibility to assure that their tender offers are legal and in the best public interest.

Consequently, the defendant's spurious argument that "overriding federal policy" automatically rendered the tender offer "defunct" has no validity whatsoever, and only serves to cover up the gaping flaws in G&W's underlying defense of "impossibility of performance."

B. Defendants Have Not Proven the Defense of "Impossibility of Performance."

G&W apparently concedes that the preliminary injunction did not render performance impossible in an absolute sense, since G&W could have conceivably litigated on the merits or taken other steps to alleviate the potential antitrust problems. Nevertheless, G&W argues that the standard of "impossibility should be governed by "pragmatic considerations" (G&W Br. 33).

G&W conveniently forgets that, even if such practical considerations play a role in the law of "impossibility", they involve factual issues that require a trial on the merits. Since "impossibility" is an affirmative defense, G&W has the burden of actually proving such alleged facts. They cannot be determined unilaterally by G&W-based solely on G&W's own interests - and then forced upon the other parties to the contract. Yet, this is exactly the result that G&W is asking this Court to condone and approve.

It should be noted that the defendants have never filed any Answer to plaintiff's Complaint, and therefore have never pleaded

the affirmative defense of "impossibility" as required by the Federal Rules of Civil Procedure. Instead, they have improperly attempted to raise this factual issue in conjunction with their Motion to Dismiss. In deciding such a motion, the only issue properly before the lower court was whether plaintiff failed "to state a claim upon which relief can be granted", and the issue of alleged "impossibility" should not have even been considered. Fed. R. Civ. P. 12(b), 56.

Defendants have compiled a list of reasons why it was purportedly undesirable from G&W's standpoint to pursue any of its options to remove the preliminary injunction and legalize the tender offer. Basically, G&W asserts that it felt the chances of its success on the merits were "remote at best" (G&W Br. 44, footnote)-in contrast to its protestations elsewhere that there was no illegality - and that it was not worth the burden to G&W of being entangled in "protracted litigation".

There are absolutely no facts on the record that would indicate whether "protracted" litigation would have actually been necessary or how long it would have been likely to take. All we have are the speculations and conclusions drawn by G&W, without a shred of evidentiary support.

In attempting to bolster its contention that the possible delay of litigation amounts to "practical impossibility", G&W desperately grasps at the inapplicable defense that "time is of the essence." G&W Br. 39. However, G&W forgets that this doctrine can only be raised where the other party has failed to perform within a period of time specified by the contract. The tendering shareholders had

already performed in a timely fashion and were in no way responsible for G&W's delay in consummating the tender offer.

Equally unsupportable is G&W's theory that the preliminary injunction caused a practical impossibility by barring consummation "during the only period when the offer had commercial reality." G&W Br. 33. Such an alleged "period of commercial reality" was never specified or even intimated in the tender offer, and is based purely on G&W's own unilateral value judgment without any support in law or fact.

G&W's argument finds no support in the quotation from Professor Corbin (G&W Br. 39), which would only discharge a contract if the restraint "lasts during the whole period allowed by the contract for performance." 6 A.Corbin Contracts Section 1348 at 441 (1962).

The only time for performance specified by the tender offer was with regard to the February 13th deadline for tendering shares, and that part of the contract was duly performed. The time for G&W's performance was merely "as soon as practicable following the expiration of this offer." 17 A. Para. 2. Therefore, the tendering shareholders were the only ones entitled to complain if consummation was delayed. If they were willing to wait an extended period of time for their money, this was their option.

Therefore, G&W's entire argument on the alleged "perishability of tender offer" (G&W Br. 44), is fabricated wholly out of G&W's own self-serving and unfounded assumptions.*

*If G&W was in fact purchasing said shares for investment purposes, as alleged in its tender offer, the delay in consummation would not have been any detriment to it. (The term "for investment purposes" has been generally construed as a long-term holding in excess of six months).

This Court has already rejected this same argument in the G&W v. A&P litigation,476 F.2d at 698, n. 19 (supra at page 20).

The same is true of G&W's assertion that it would have been impossible to take steps, short of litigation, to remove the obstacles to a legal tender offer. We have no evidence that G&W made any efforts in this direction or even explored the various possibilities. To the contrary, it appears that G&W steadfastly refused to consider such options.

It must be remembered, for example, that when,during the argument before this Court, G&W's attorney, Whitney North Seymour, Sr., was asked by Judge William H. Timbers for assurance that G&W would not seek to acquire any further amounts of A&P stock, Mr. Seymour replied that he did not think G&W should be "frozen in the matter." 119a.

Likewise, counsel for plaintiff made several attempts to meet with the respective parties and the trial court in order to explore the avenues for legally consummating the tender offer without prolonged litigation.(See 126a, 129a), but these proposals were totally disregarded.

Defendants have tried to side-step the need for an evidentiary hearing to determine the disputed factual issues of whether performance was indeed "impossible," as G&W claims, and whether G&W was really innocent of any underlying "fault". The plaintiff has not been permitted any opportunity for discovery; there has not been one word of testimony taken, not one deposition, and defendants have not answered one interrogatory. Plaintiff has been denied the opportunity to cross-examine defendants to test their credibility. Nevertheless, G&W seems to suggest that these funda-

mentals of due process can be dispensed with in the present case, because Judge Duffy presumably had certain personal knowledge which he gained by presiding over the G&W v. A&P litigation. See G&W Br. 36. If such a result were condoned, courts would be free to prejudge cases based merely on a one-sided view of facts completely outside the record, without regard to the kind of adversary proceeding that is basic to our American system of justice.

In essence, G&W's arguments do not support the legal defense of impossibility. Rather, G&W is asking this Court to supply, by implication, a host of secret reservations whereby G&W would be free to exercise a series of options, at any time and in its sole discretion; to escape its contractual responsibilities. Such conditions were not expressed in the tender offer, were not part of the bargain agreed to by the tendering shareholders, and have no support in fact or law.

Furthermore, the full-disclosure policies of the Williams Act should play a persuasive role in the interpretation of tender offer contracts. In accepting a tender offer, the tendering shareholders are entitled to assume that the offer expressly sets forth all "material matters" that would affect a reasonable investor's decision of whether or not to tender. The secret options and conditions claimed by G&W are certainly of extreme importance to a tendering shareholder, and therefore the kind of "material matters" which should be expressly spelled out.

CONCLUSION

G & W and Bluhdorn have found it necessary in their Brief, not only to rewrite the facts and the law, but also to malign the named plaintiff in order to defend this action. Such tactics should be soundly and unequivacally rejected. The plaintiff class is clearly entitled to relief under the Securities & Exchange Act, as well as under contract law. To hold otherwise, would emasculate the Williams Act and expose the investing public to unspecified and unconscionable risks.

The real over-reachers in this case are the defendants, who sought to acquire that which the law forbade; the tendering shareholders are the victims.

The salient effect of enforcing the rights of the tendering shareholders herein is not only therapeutic, but will insure that tender offers made in the future would include full disclosure without secret reservations and unlawful tender offers will not be recklessly imposed upon the unsuspecting public.

Respectfully submitted,

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A 202 Affidavit of Personal Service of Papers

LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS: SECOND CIRCUIT

LOWENSCHUSS,

Plaintiff-Appellant,

- against -

KANE, et al,

Defendants-Appellees.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF ss.:

I, James Steele, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 250 West 146th. Street, New York, New York *That on the* 31st *day of* January *1975 at* *

deponent served the annexed Reply Brief *upon*

* *the* *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) . *herein.*

Sworn to before me, this 31st *day of* January 1975

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975

James Steele

JAMES STEELE

* Milton Paulson-122 E. 42nd St., New York

* Sullivan & Cromwell- 48 Wall St., New York

* Simpson, Thacher & Bartlett- 1 Battery Park Pl. New York